71-1380

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MICHAEL RODAK, JR., CLE

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IN THE

Supreme Court of the United States

1971 TERM

NO. _____

RESPONSE NOT PRI

E. B. CALDWELL, WARDEN,
GEORGIA STATE PRISON,
Petitioner,

v.

JERRY DALE MATHIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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E. B. CALDWELL, WARDEN,
GEORGIA STATE PRISON,

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v.

JERRY DALE MATHIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, E. B. Caldwell, Warden, Georgia State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on February 1, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears together with the judgment in the appendices hereto as Appendix "A". The opinions of the District

Court in this case and in *Hiatt v. Smith*, referred to in its opinion in this case, both unreported, appear in the appendices hereto as Appendix "B" and Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 1, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the traditional, longstanding Georgia jury instructions regarding alibi, considered in the context of the instructions in their entirety, have the effect of shifting to the defendant the burden of persuasion on an essential element of the crime charged, thereby relieving the prosecution from proving every element of the offense beyond a reasonable doubt and impairing the presumption of innocence with resulting deprivation of due process of law.

2. Whether the initial decision on the constitutionality of the traditional, longstanding Georgia alibi charge should be applied retroactively to a convicted State prisoner who challenges such jury instructions for the first time in a collateral attack on the conviction.

3. Whether the decision of the Court of Appeals for the Fifth Circuit in *Jack H. Smith v. S. Lamont Smith*, 454 F.2d 572 (5th Cir. December 14, 1971), now pending in this Court on petition for certiorari, No. 71-1148, 1971 Term, should apply to the instant case if the circuit court decision in *Smith* is upheld or if certiorari to review *Smith* is denied.

STATUTORY PROVISIONS INVOLVED

Ga. Code § 38-122 (1933):

> 38-122 (1018 P.C.) Alibi as a defense.—Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence. (59 Ga. 142; 65 Ga. 756; 64 Ga. 344.)

STATEMENT OF THE CASE

The Respondent, Jerry Dale Mathis, is serving two consecutive three-and-one-half year sentences imposed when he was convicted by a jury of two counts of burglary on September 4, 1969, Madison County Superior Court, Georgia. He was represented by counsel. No appeal from the convictions ensued.

In July, 1970, Mathis ("prisoner") petitioned the Superior Court of Tattnall County, Georgia, for habeas corpus relief, claiming solely that the alibi charge was infirm by federal constitutional standards. Response was made and a hearing was held, the prisoner being represented by counsel. The entire jury charge was submitted in evidence as an exhibit by him. It is set out in Appendix D to this petition. On November 11, 1970, the state court denied habeas corpus relief in an order which set out findings of fact and of law, including a lengthy review of the law in Georgia on the alibi charge. The judgment was affirmed by the Supreme Court of Georgia on appeal. *Mathis v. Smith,* 227 Ga. 314 (1971).

Federal action in the United States District Court for the Middle District of Georgia, Athens Division, was

commenced by Mathis *pro se* in May, 1971. Pursuant to that court's order to show cause, a Response and Answer was filed by the Warden, attaching as exhibits thereto the entire record and transcript of the state habeas corpus proceeding. Mathis filed a traverse.

The prisoner's assertion was that the portion of the state criminal trial court's charge to the jury concerning alibi "shifted the burden of proof from the State to the defendant and thus placed upon him the unconstitutional burden of proving his defense of alibi which destroyed his presumption of innocence." On July 22, 1971, the district court ruled that the charge given was substantially the same as that given by the state criminal trial court in the case of William Paul Hiatt and was therefore not infirm, consequently denying habeas corpus relief. See Appendix B. The district court had examined the alibi charge in the similar habeas corpus action Hiatt had brought and had found the charge did not constitute a denial to defendant Hiatt of due process of law under the United States Constitution. See Appendix C. (On appeal, the Fifth Circuit Court of Appeals summarily reversed that decision. *Hiatt v. Smith*, 5 Cir. 1971, ... F.2d ..... [February 1, 1972, No. 71-2512]. The reversal is the subject of a petition for writ of certiorari, being filed in this Court by another warden at the same time as the within petition.)

A notice of appeal was filed by Mathis and on August 16, 1971, the court issued a certificate of probable cause and order authorizing appeal in forma pauperis.

The Warden urged below that the district court was correct in its conclusions of law and that its judgment should be affirmed. It was noted that the charge in the instant case was actually clearer in two aspects than the

charge litigated in *Hiatt v. Smith, supra,* upon which case the district court had relied.

It was pointed out first that it specifically distinguished for the jury the difference between the State's burden of proof and the palpably more liberal context in which it should view the defendant's alibi evidence. The trial court instructed:

> "The burden is on the accused to establish this alibi, not beyond a reasonable doubt, but to the reasonable satisfaction of you, ladies and gentlemen of the jury."

Secondly, it was pointed out that the charge makes abundantly clear the double opportunity for acquittal which an alibi defense serves. The trial court instructed the jury that if it was not reasonably satisfied of the truth of the alibi, they should still consider it together with all of the evidence in the case, and if in that context it raised a reasonable doubt of guilt, acquittal was mandated.

However, the court below transferred the appeal to the summary calendar and on February 1, 1972, without oral argument, reversed the district court decision and remanded the cause for a new trial. On the several subsequent motions filed by the Warden, stay of the issuance of the mandate was granted until final disposition in the United States Supreme Court of the case of *S. Lamont Smith v. Jack H. Smith,* 1971 Term, No. 71-1148, petition for writ of certiorari pending.

REASONS FOR GRANTING THE WRIT

The decision of the court below turned upon its decision in the case of *Smith v. Smith,* 5th Cir. No. 71-1311, rehearing denied February 1, 1972, certiorari applied

for, U.S. Supreme Court No. 71-1148, docketed March 8. Reasons enumerated for granting the writ in the instant case are the same as those contained in the application filed with this Court in No. 71-1148. In the interests of economy and the obvious desirability of consolidating the numerous cases turning upon the same questions of law, the argument in support of the reasons for granting the writ in the previously docketed application for a writ of certiorari is hereby incorporated by reference. Copies of the application for certiorari in *Smith v. Smith* are attached to and accompany the service copies of this application.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH A DECISION FROM THE COURT OF APPEALS FOR THE FIRST CIRCUIT ON THE SAME CONTROLLING PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

II.

THE DECISION OF THE COURT BELOW IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A SERIES OF CONTEMPORARY DECISIONS OF THE SUPREME COURT OF GEORGIA ON THE SAME PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

III.

THE DECISION MISCONCEIVES, MISCONSTRUES AND MISAPPLIES A DECISION OF THIS COURT ON A VITALLY IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

IV.

IN THE EVENT THE *SMITH* RULING IS UPHELD, IT SHOULD HAVE PROSPECTIVE EFFECT ONLY.

There is yet a fourth reason for granting the writ in this case. It arises from the summary application of the decision in *Smith* to the case at hand, without limiting the holding in Smith to prospective use.

Mathis was convicted on September 4, 1969. It was at that time that the charge here involved was given. The Fifth Circuit decision in *Smith, supra,* which was the basis for the reversal of the denial of habeas corpus in the instant case, was announced on December 14, 1971. The underlying case, then, was decided subsequently to Mathis' trial and to the giving of the charge complained of.

Even if the charge fails now to meet constitutional muster, and it has been demonstrated and is urged that it does not so fail, the decision in *Smith, supra,* should not be applied retrospectively in this case.

Petitioner's position in this regard was stated in the Briefs for the Appellant filed in the Fifth Circuit in the *Smith* case and in the related case of *Thornton v. Caldwell,* 5 Cir. 1971, ... F.2d ..... [January 4, 1972, No. 71-1603], petition for writ of certiorari filed in this Court on or about the same day as the instant petition. That position, advanced earlier by Petitioner, is firmly restated here:

> While it is presently impossible to state with accuracy the number of Georgia convictions which would stand to be affected and relitigated should the decision of the court below be upheld, expe-

rience to date would indicate that by the most conservative estimate the figure will run into the hundreds, perhaps even into the thousands. The requisite finality of criminal proceedings upon which effective crime deterrence and law enforcement are drastically dependent, have been dealt yet another staggering blow. More importantly, the atmosphere of non-finality with its attendant state-guilt will seriously undermine and impede the sociological plateau upon which correctional rehabilitation must necessarily commence—the recognition of the individual inmates that the conduct for which they are incarcerated is the result of their own, and not the State's wrong doing. And to what end? Are the noble ideas of the Constitution properly served by judicial determinations that are at once both disruptive and piddling? The [Petitioner] submits that they are not, and adheres firmly to his belief that this Court will so agree.

At best, the court below could complain of the Georgia charge on the ground that it was possibly confusing to the jury. (The confusion, if any did exist, would reasonably appear to have been more advantageous to the inmate than to the State, the most notable vice in that Georgia alibi charge being its tendency to overemphasize and overinstruct the jury on the alibi question . . .) In no event could reasonable men really suppose that the Georgia alibi charge affected the integrity of the fact-finding procedure so as to call for retroactive application. In light of the disastrous effects of the court below's conclusion, the decision of the court below applying retroactively its conclusion as to the Georgia alibi charge should be reversed.

It is submitted that an application of the principles involving retroactivity, as developed in *Stovall v. Denno*, 388 U.S. 293 (1967), warrants the nonapplicability of the previous lower court decisions

to the instant case. See also *Mackey v. United States*, 401 U.S. 667 (1971). Since the extent of the reliance by law enforcement authorities on the old standard has been continuous in Georgia since the last century, *Harrison v. State*, 83 Ga. 129 (1889), and the effect on the administration of justice of a retroactive application of the new standards if adopted, would create a potentially unhandleable burden of retrial on the State, with resultant release of prisoners without retrial, the objection to the charge as given, if valid, should be given only prospective application.

The third criteria for considering this question is the purpose to be served by a new standard. It would appear that the purpose to be served by removing the objected-to portion from the charge on alibi would simply omit language which Respondent feels may have shifted the burden in the jury's minds. The suppositious nature of this contention shows that the purpose to be served by removing the language only cures a conjectural defect. It is only *assumed* that the jury is misled or confused by the objected-to portion of the charge. Not being a clear-cut or concrete deprivation of a constitutional protection, the ruling if upheld should for this reason also, be given only prospective application.

CONCLUSION

The issues involved here and in other petitions now pending in this Court, to wit: *Smith v. Smith*, No. 71-1148; *Caldwell v. Thornton*, No. .....; and *Smith v. Hiatt*, No. ....., have become a most troublesome and disruptive problem in the administration of criminal justice. See the list of cases in *Smith v. Smith, supra*, Petition for Certiorari, Appendix F, and the additional list of cases appended hereto as Appendix E. The issue remains open as one of substantial importance in

the administration of the criminal law. It is respectfully requested that this Court grant the writ of certiorari for the purpose of reviewing and reversing the decision of the Court of Appeals.

Respectfully submitted,

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Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I, counsel of record for Petitioner herein and a member of the Bar of the Supreme Court of the United States, have this day served true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit together with a copy of the Petition for a Writ of Certiorari in the case of *Smith, Warden v. Smith*, U. S. Supreme Court No. 71-1148, by mail, by depositing same in a United States mail box, with first-class postage prepaid, addressed to the following, who represents himself, there being no counsel of record:

Mr. Jerry Dale Mathis
Respondent pro se
P. O. Box 1150
Waycross, Georgia 31501

This.....day of....., 1972.

.....

COURTNEY WILDER STANTON

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2607

Summary Calendar*

JERRY DALE MATHIS,

Petitioner-Appellant,

VERSUS

E. B. CALDWELL, WARDEN,
Georgia State Prison,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(February 1, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: On the basis of our decision in *Smith v. Smith*, 5th Cir. 1971, ... F.2d ..... [No. 71-1311, December 14, 1971], the judgment of the district court is REVERSED and the cause is REMANDED for a new trial.

---

*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for a new trial in accordance with the opinion of this Court;

It is further ordered that respondent-appellee pay the costs on appeal in this Court.

February 1, 1972

Issued As Mandate:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JERRY DALE MATHIS,
Petitioner
v.
E. B. CALDWELL, WARDEN,
GEORGIA STATE PRISON,
Respondent

CIVIL ACTION
NO. 772

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPPUS WITHOUT A HEARING

Filed July 22, 1971

Applicant filed his petition for writ of habeas corpus alleging that the state court judge presiding at his trial "in its charge to the jury, shifted the burden of proof from the state to the defendant and thus placed upon him the unconstitutional burden of proving his defense of alibi which destroyed his presumption of innocence."

This court has carefully examined the charge complained of and finds that it is substantially the same as the charge approved by this court in *Hiatt v. Smith,* Civil Action No. 2661, dated July 8, 1971. For the reasons set forth in that opinion, applicant's petition is herewith denied.

SO ORDERED this 22 day of July, 1971.

/s/ W. A. BOOTLE

Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIAM PAUL HIATT, *Petitioner,* v. DOYAL SMITH, WARDEN, PUTNAM COUNTY PRISON, *Respondent.*	CIVIL ACTION NO. 2661

Filed July 9, 1971

BOOTLE, Chief Judge:

This petitioner, confined under a state court sentence, by habeas corpus seeks release because of alleged errors in the trial Judge's charge to the jury. He obviously must show that "he is in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). "Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair." *Higgins v. Wainwright,* 424 F. 2d 177, 178 (5th Cir. 1970). Such error must be "so gross as to result in violation of petitioner's constitutional rights." *McDonald v. Sheriff of Palm Beach County, Florida,* 422 F. 2d 839, 840 (5th Cir. 1970). Such "improprieties [must] clearly show a denial of due process such as to deprive the petitioner of fundamental fairness." *Murphy v. Beto,* 416 F. 2d 98, 100 (5th Cir. 1969). In *Gomez v. Beto,* 402 F. 2d 766, 767 (5th Cir. 1968) *cert. den.* 89 S.Ct. 1217, the court said: "The state trial court's charge to the jury has a

portion which, read out of context, would appear to be an instruction to find the defendant guilty. No objection was noted by defendant's counsel. . . . The belatedly claimed error in the state court's charge was certainly not so gross as to result in violation of the Constitution of the United States and thus to require discharge on habeas corpus. 28 U.S.C. § 2254." The Court of Appeals for the Fourth Circuit sums it up this way:

> "The points made in the present proceeding all pertain to state law, and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and *instructions to the jury* in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal." (Emphasis added). *Grundler v. State of North Carolina,* 283 F. 2d 798, 802 (4th Cir. 1960).

See also *LaBrasca v. Misterly,* 423 F. 2d 708, 709 (9th Cir. 1970).

The petition fails to allege that petitioner expressed any dissatisfaction with the charge at the time it was given or at any time since then until the filing of this petition in this court. He justifies his failure to file any application in the state courts seeking relief from confinement upon the ground that the Supreme Court of

Georgia has consistently upheld charges on alibi substantially the same as the charge here complained of, citing *Mathis v. Smith,* 227 Ga. 314 (1971) and *Smith v. Hightower,* 227 Ga. 144 (1971). For the purposes of this case we shall assume that petitioner has sufficiently exhausted, or rather is relieved from the necessity of exhausting, his state court remedies. See *Davis v. Smith,* 430 F. 2d 1256, 1258 (5th Cir. 1970).

The portion of the charge complained of is as follows:

> "Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. *Alibi as a defense must be established to the reasonable satisfaction of the jury.*
>
> "The Court charges you that when the defendant sets up, as a defense, alibi, *the burden is upon him to establish his defense of alibi to your reasonable satisfaction.* It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a reasonable doubt as to the guilt of the accused, it would be their duty to acquit."

Other significant portions of the charge are as follows:

> "The charge of the court should be received and

considered by you in its entirety, as a whole, as one body of law applicable to this case. . . . "

* * *

"You are the sole judges of the facts of the case. You are the sole judges of the credibility of the witnesses. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the defendant."

* * *

"This defendant enters upon this trial with the presumption of innocence in his favor and this presumption remains with him until and unless the State shall overcome and remove it by the introduction of evidence and proof to you sufficient to convince your minds to a moral and reasonable certainty and beyond *a reasonable doubt* of the guilt of the accused."

* * *

"The burden of proof is on the State to prove every material allegation in this indictment. Under our law, in no sense is the defendant required to prove that he is innocent. As stated, he is presumed to be and remains so until the State proves his guilt, not by a mere preponderance of the evidence as in civil cases, but beyond *a reasonable doubt*."

* * *

"The defendant entered upon the trial of this case with the presumption of innocence in his favor. That presumption of innocence remains with him throughout the trial, and upon it you should acquit him unless the State, by the introduction of evidence in your presence and hearing, during the course of the trial has removed that presumption of innocence, and satisfied your minds and consciences of his guilt beyond *a reasonable doubt*." (Emphasis added).

Then comes the portion of the charge complained of by petitioner as follows:

> "Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. Alibi as a defense must be established to the reasonable satisfaction of the jury.
>
> "The Court charges you that when the defendant sets up, as a defense, alibi, the burden is upon him to establish his defense of alibi to your reasonable satisfaction. It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain *a reasonable doubt* as to the guilt of the accused, it would be their duty to acquit." (Emphasis added).

Then the charge continues:

> "The court charges you if you believe beyond *a reasonable doubt* that at any time within seven years next preceding the date this bill of indictment was returned by the Grand jurors [the defendant did threaten to shoot, etc] . . ., and further, if you believe beyond *a reasonable doubt* that said pistol was an offensive weapon, . . . then and in such event

you would be authorized to find the defendant guilty of robbery as charged in this bill of indictment.

"The court charges you, if you have *a reasonable doubt* as to the defendant's guilt of the offense of robbery as charged in this bill of indictment, it would be your duty to give him the benefit of that doubt and to acquit him."

* * *

"If you acquit the defendant, or if you have *a reasonable doubt* about the defendant's guilt, the form of your verdict would be: 'We, the Jury, find the defendant, William Paul Piatt, not guilty.'" (Emphasis added).

Whether or not there is any error at all in the charge complained of it is not necessary for this court to decide. The question here is not whether the trial court committed error in its charge, but whether it committed such gross or egregious error as to constitute a denial to defendant of due process of law under the United States Constitution. As the Court of Appeals for the Fourth Circuit in *Grundler*, said:

> "We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights." At 802.

Thus, if we assume arguendo that there is possibly some error in the trial court's charge, or some lack of clarity, or some ambiguity which could possibly give rise to confusion, nevertheless, this petition for writ of habeas corpus must be denied and dismissed because such error, if any error there be, pertains to state law and does not rise or sink to constitutional proportions.

A reference to the charge shows that the jury was instructed very clearly that the petitioner entered upon his trial with the presumption of innocence in his favor and that that presumption remained with him until and unless the state should overcome and remove it by the introduction of evidence and proof sufficient to convince the jurors to a moral and reasonable certainty and beyond a reasonable doubt of the guilt of the accused, and that in no sense was the petitioner required to prove that he was innocent. The necessity for proof of guilt beyond a reasonable doubt was repeated over and over in the charge and the words "reasonable doubt" being repeated no less than eight times in the main charge and no less than four times in the supplemental charge.

Actually it may well be that the two paragraphs of the charge complained of relating to alibi as a defense was helpful to petitioner rather than harmful. It made it clear to the jury that alibi could be established to the "reasonable satisfaction of the jury" and thus was not required to be established either beyond a reasonable doubt or by a preponderance of the evidence. The defense of alibi, while negativing and rebutting the state's proof of presence at the scene of the crime, is really more than that in that it is an attempt by a defendant to prove that he was elsewhere and specifically where else he was. This is an undertaking on the part of the defendant and since it is his undertaking it may well be questioned whether he is harmed at all by an instruction that it is his onus or his burden to prove what he proposes to prove. Of course, it would be error of constitutional proportions to charge the jury that if he failed in that proof he must be convicted, but the charge complained of contains no such intimation. First of all, it tells the jury that if the defense

is established then regardless of all other considerations, regardless of what the state has proved, regardless of how much evidence the state has adduced, "it is the duty of the jury to acquit." The charge thus makes the defense of alibi a perfect and complete defense if it is established by the lowest quantum of proof possible, namely, "to the reasonable satisfaction of the jury." And then of great importance follows the concluding sentence of the portion of the charge objected to:

> "Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a reasonable doubt as to the guilt of the accused, it would be their duty to acquit."

Certainly, whatever error there is, if any, in this charge does not rise to constitutional proportions.

Apparently the charge complained of has been the law of Georgia for more than eighty years. In the leading case of *Harrison v. The State,* 83 Ga. 129 (3), decided in 1889, the Supreme Court of Georgia, in an opinion written by Chief Justice Bleckley, after reviewing a number of cases previously decided as therein set forth summarized and expressly approved the law as set forth in the third headnote of that decision as follows:

> "Touching *alibi*, the rule in Georgia as established by authority consists of two branches. The first is, that to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on

> the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. In sense and substance, the charge of the court in the present case conformed to the rule, certainly to the latter branch of it."

The litigation and adjudications in the Eighth Circuit repeatedly approved by the supreme court ever since 1889, and as recently as the case of *Thornton v. State*, 226 Ga. 837 (1970).

The litigation and adjudications in the Eighth Circuit recently[1] revolved about a somewhat similar and yet quite different view of the state courts of Iowa concerning the law of alibi. The Supreme Court of Iowa in an opinion reported in 264 N.W. at 602, as copied in *Johnson v. Bennett*, 414 F. 2d 50, 51 (8th Cir. 1969) expressed its alibi rule as follows:

> " 'An alibi is an affirmative defense; the burden of proof is upon the person setting up an alibi to prove it by a preponderance of evidence. Of course, if the whole record raises a reasonable doubt of his guilt, he may be found not guilty. The instructions in this case in regard to the alibi did not go as far as such instructions many times rightfully go. The court might very well have told the jury, in addition to what he said about an alibi, that the evidence of an alibi should be scanned with caution; that it is a defense easily manufactured.' "

The differences between the Iowa rule and the Georgia rule are twofold: first, Iowa requires proof of alibi by preponderance of evidence, Georgia only to the reason-

[1]See *Johnson v. Bennett*, 386 F. 2d 677 (8th Cir. 1967); *Stump v. Bennett*, 398 F. 2d 111 (8th Cir. 1968); *Johnson v. Bennett*, 393 U. S. 253, 21 L. Ed. 2d 415 (1968), and *Johnson v. Bennett*, 414 F. 2d 50 (8th Cir. 1969).

able satisfaction of the jury, see *Bone v. The State*, 102 Ga. 387, 393 (1897); second, the courts in Iowa instruct the juries that evidence of an alibi should be scanned with caution; Georgia has no such rule.

This court cannot bring itself to a holding that all of the courts of Georgia from the Supreme Court on down trying or reviewing criminal cases have for more than three-quarters of a century denied due process of law to all defendants appearing before them and relying upon alibi as a defense. The standard jury instruction on alibi has no such effect. It has no such meaning in the minds of Georgia judges, nor is it understood to have any such meaning or effect by Georgia lawyers. It simply means that if a defendant charged with being at point A, the scene of the crime, when the crime was committed is not content simply to deny his presence there but chooses to create the issue that he was actually at point B at the time the crime was committed, he has some obligation if he wants to convince the jury that he was actually at point B so to convince them not beyond a reasonable doubt, not by a preponderance of the evidence, but at least to the satisfaction of the jury. If he is to establish the fact that he was actually at point B how can he do so except to the satisfaction of the jury. Under the standard charge as given in this case, if he wins on that point he has carried the day, regardless of how much evidence the state has produced against him and regardless of any and all other considerations, factual or legal, but if he loses on that point his battle is not lost and he is right back where he would have been had no defense of alibi been asserted, with the additional advantage, however, of having the jury instructed that whatever evidence he offered in support of his alibi must still be

considered by them in determining whether or not the state has proved his guilt beyond a reasonable doubt.

> "Though the burden was the defendant's to show alibi to the satisfaction of the jury, and on that issue reasonable doubts would not avail him, yet, on the final issue of guilty or not guilty . . . all the evidence is for the consideration of the jury, and it is for them to say whether, from all of it, he is guilty beyond a reasonable doubt." *Ledford v. The State of Georgia,* 75 Ga. 856, 858 (1885).

But if we assume that under no circumstances can the court say to the jury that a defendant who pleads that he was at point B has any burden, onus, or responsibility with respect to establishing such contention, nevertheless a court in doing so would be committing only a procedural error with respect to a matter of state law and would not be depriving such defendant of due process of law under the Constitution of the United States. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U. S. 604, 619, 97 L. Ed 593, 605 (1953).

Steeped in the doctrine of *Falgout v. United States,* 279 Fed. 513 (5th Cir. 1922), (see *Thomas v. United States,* 213 F. 2d 30 (9th Cir. 1954)), and accustomed to charge in accordance therewith, this court is a little reluctant to say that the charge petitioner complains of was entirely free of error, but is entirely convinced that any error therein does not rise to constitutional proportions.

Since the facts are not in dispute, and taking the petition at face value, and having thoroughly considered petitioner's brief filed therewith, convinced that the petition sets forth no grounds for his release from custody,

the court hereby denies the petition and dismisses the same without a hearing.

This 8th day of July, 1971.

/s/ W. A. BOOTLE

Chief Judge

APPENDIX D

CHARGE OF THE COURT

Ladies and gentlemen of the jury, you have been trying the case of the State versus Jerry Mathis, who is charged with the offense of burglary. There are three other co-defendants in this case. Jerry Mathis elected to sever, that is elected to have a separate trial. He had a legal right to request severance, and it is mandatory on the Court to allow him to sever. You will not concern yourselves with the other co-defendants or whether or not they are guilty or innocent. You will only concern yourselves with this one defendant, Jerry Mathis. He is charged with burglary, an alleged violation of the criminal laws of Georgia. This case came to you by virtue of an indictment returned by the Madison County Grand Jury. It will be out with you at all times; if you need to be informed as to its contents, it will be your duty and your privilege to read it, or any portion thereof. I will not take the time to read the indictment.

I caution you that an indictment does not constitute evidence, nor does the fact that the Grand Jury returned an indictment against the Defendant constitute any evidence or inference of guilt. It is merely the manner in which the matter is brought into Court for trial on its merits as revealed in your presence and hearing.

The Defendant has filed his plea of not guilty, whereby he denies the charges, and places the burden on the State to prove his guilt beyond a reasonable doubt. In criminal cases, you are the judges of both the law and the facts. The law will be given you in charge by the Court, and you are bound by it, except that you are the judges of it, in applying it to the facts as you find them to be

from the evidence developed in the case and from the Defendant's statement.

Every Defendant enters upon the trial of a criminal case with a presumption of innocence in his favor, and this presumption remains with him until and unless the State shall overcome and remove it by the introduction of evidence and proof to you sufficient to convince your minds to a moral and reasonable certainty and beyond a reasonable doubt the guilt of the accused. In no event is the Defendant required to prove that he is innocent.

Moral and reasonable certainty is all that can be expected in legal investigations. A reasonable doubt means just what it says. It is not an imaginary, fanciful or arbitrary doubt; it is not a bare possibility doubt, but it is the doubt of a fair minded impartial juror honestly seeking the truth. It may arise from the evidence, from a lack of evidence, from a conflict of evidence, or from the Defendant's statement. The burden is on the State to prove every material allegation in the indictment, not by a mere preponderance of the evidence as in civil cases, but beyond a reasonable doubt.

A number of witnesses have testified in this case. The law directs that it is your duty, where it can be done to reconcile the conflicts in the evidence, and the testimony of the witnesses, or in the testimony of any witness or witnesses, and the statement of the Defendant, so as to make all speak the truth and perjury be imputed to none of them. However, if you cannot do that, it becomes your duty to believe that witness or those witnesses, or the Defendant's statement, or the evidence you think is best entitled to belief.

You are the sole judges, ladies and gentlemen, of the

credibility of each and every witness. In passing upon the credibility and deciding which are best entitled to belief, where there is a conflict, you may consider all of the facts and circumstances of the case; the witnesses' manner of testifying; their intelligence; their means and opportunity for knowing the facts to which they testified; the probability or improbability of their testimony; their interest or want of interest; and also their personal credibility, so far as the same may appear from the trial.

Ladies and gentlemen, in this case the Defendant has made an unsworn statement in his own defense, which he had a legal right to do. This statement was not under oath, and he could not be compelled to answer any questions on cross examination. It has such force and effect as you, the jury, may think right to give it. You may believe it in whole or in part, and you may believe it is preference to the sworn testimony in the case.

Evidence is of two kinds, ladies and gentlemen, direct evidence, and indirect or circumstantial evidence. Direct evidence is that which immediately points to the questions at issue. Indirect or circumstantial evidence is that which only tends to establish the issues by proof of various facts sustaining by their consistency, the hypothesis or conclusion claimed. Indirect or circumstantial evidence is that which does not in itself establish the ultimate fact, but does establish facts and circumstances from which, according to the common experience of mankind, a reasonable inference may be drawn of the actual existence of such ultimate fact in issue. When circumstantial evidence is relied upon to establish a fact, the evidence must be such as to reasonably establish the theory relied upon, and to preponderate to that theory, rather that to any other reasonable hypothesis. The com-

parative weight of circumstantial and direct evidence on any given issue is a question of fact, for you, the ladies and gentlemen of the jury, to determine. However, before you would be authorized to convict on circumstantial evidence alone, the proven facts must not only be consistent with the hypothesis, or conclusion of guilt, but must exclude every other reasonable hypothesis or conclusion, except that of the guilt of the accused. A conviction must not rest upon suspicion, conjecture or possibility of guilt however. All the facts and circumstances of the case, and all reasonable deductions therefrom present two theories, one of innocence, and one of guilt. In that event, the jury should acquit.

I charge you further, ladies and gentlemen. The charge against this Defendant is burglary. I advise you that burglary is a violation of the laws of Georgia, a felony punishable by confinement in the penitentiary for a term of not less than one, or more than twenty years. Burglary is the breaking and entering into the dwelling, mansion, storehouse, or other place of business of another where valuable goods, wares, produce, or other articles of value are contained and stored with the intent to commit a felony or a larceny. You will see that there are several ingredients in the offense. It must be a house such as described where valuable goods, wares, produce, or other articles of value are located. There must be both a breaking and entering into the house described. There must be an intent to commit a felony or a larceny therein. In the absence of any one of these ingredients, the offense of burglary has not been established.

Any removal by the Defendant of those things which are usually found in a house to protect the house from intruders from the outside would be a breaking within

the law. It is breaking within the law to open a door with a key, and to enter with the intent to steal; or to raise a window; or to break a glass on a window and raise the window after; or to turn the knob of a door and enter by that means; or to open a door that is closed and enter by that means. It is such force as would be necessary to break into the house, and which destroys or puts out of the way those safeguards about a house that are intended to protect the house from intruders from without. There must be an entering into the house after the breaking, and this must be done with the intent to commit either a felony or a larceny.

I charge you that a house used in this connection as one's business, or used as a part or parcel of equipment of such business in the operation of same in which business of some character transacts is a place of business under the law and is subject to the matter of burglary. The charge in this case is that the burglary was committed on a house, or a residence. I charge you if you find the fact to be such beyond a reasonable doubt that a residence or home would be such a house that would be subject of a burglary. The only houses under our law which is subject matter of burglary are dwellings, mansions, storehouses, or other places of business where valuable goods, wares or produce or other articles of value are contained or stored.

If you find in considering the evidence and the Defendant's statement that a burglary was committed as charged, that the property was taken from the homes as charged in the indictment, and that this property or any part of it is alleged to have been taken from the homes referred to in the indictment, was found recently thereafter in the possession of this Defendant, you may con-

sider that circumstance and give it such weight as you see proper on the question of whether it establishes beyond a reasonable doubt that the Defendant was the person who broke and entered the homes, or even if you find that a house was broken in. The recent possession of any stolen goods under such circumstances would authorize an inference of guilt against the Defendant, and unless such alleged recent possession should be satisfactorily explained, the burden being on the Defendant to make such an explanation, this possession would authorize you, but would not require you to identify this Defendant as the guilty party, or one of the guilty parties, and convict him of the alleged crime as charged. This inference of guilty, however, is one of evidence, and not of law, and may be rebutted by evidence satisfactory to the jury, or it may be rebutted by the Defendant's statement.

I charge you the law of alibi. Alibi, as a defense, involves the impossibility of the Defendant's presence at the scene of the alleged offense at the time of its alleged commission, and the range of the evidence thus showing in respect to time and place must be such as reasonable to exclude the possibility of his presence. The burden is on the accused to establish this alibi, not beyond a reasonable doubt, but to the reasonable satisfaction of you, ladies and gentlemen of the jury. If the showingness to the alibi introduced in this case has established to your reasonable satisfaction that the Defendant was elsewhere when the alleged crime or crimes were committed, if one was committed, it would be your duty to acquit the Defendant. I further charge you that if the showingness to the alibi has not been such as to show to your reasonable satisfaction that the Defendant was elsewhere

at the time of the alleged commission, or the alleged offense or offenses, any showing whatever of alibis to be considered by you on the general case with the rest of the testimony and the Defendant's statement, and if a reasonable doubt of guilt be raised by the evidence as a whole, and including the statement of the Defendant, and including the showingness of the alibi, the doubt must be given in favor of innocence, and the Defendant should be acquitted.

I charge you further that every Defendant enters upon the trial of a criminal case with a presumption of innocence in his favor, and this presumption remains with him until and unless his guilt is proved beyond a reasonable doubt.

Now, in the event you find the Defendant guilty of burglary, ladies and gentlemen, purely by way of illustration, I am required to give you the forms of verdicts. The form of your verdict would be, "We, the jury, find the Defendant guilty, and fix his punishment at .....," and it must be for a determinant number of years, not less than a minimum of one year, not more than a maximum of twenty. Purely by way of illustration, not hinting or suggesting what you should or should not do, in the event you find the Defendant guilty, the form of your verdict would be, "We, the jury, find the Defendant guilty and fix his punishment at one year"; or it could be, "We, the jury, find the Defendant guilty and fix his punishment at three and a half years", or it could be, "We, the jury, find the Defendant guilty, and fix his punishment at sixteen years"; or, it could be, "We, the jury, find the Defendant guilty and fix his punishment at twenty years." You can fix it for a definite term anywhere between one and twenty years. If you desire to recommend mis-

demeanor punishment, after you draw your verdict up and fix his punishment, then, you can, if you see fit, add the words, "and we recommend punishment as for a misdemeanor." It is within the discretion of your judge as to whether to accept your recommendation, or whether not to accept it.

If you do not believe the Defendant is guilty of the crime charged, then, it would be your duty to acquit him, and the form of your verdict would be, "We, the jury, find the Defendant not guilty."

Now, ladies and gentlemen, this has been drawn up in Count 1 and Count 2. Consider Count 1 first, that is, the dwelling house of Mr. Robert Murray, and reach a verdict on Count 1. It will either be, "We, the jury, find the Defendant guilty, and fix his punishment at .....", and put in there the term. You can consider whether you want to recommend misdemeanor punishment; or, it will be, "We, the jury, find the Defendant not guilty." Add there, "as to Count 1." Start it off, "As to Count 1". You see, you have to consider them separate, "As to Count 1, we, the jury, find the Defendant whatever you find him." Then, you go down and consider the Tolbert residence, and then start that one off, "As to Count 2, we, the jury, find the Defendant—", and go ahead with the verdict. Actually, you are to make two separate verdicts as each one of the counts and, of course, under the law, you can find him guilty on one count, and not guilty on another. You can find him not guilty on both counts, or you can find him guilty on both counts.

Now, ladies and gentlemen, if I have said anything or done anything to indicate, hint or suggest to you that I have a desire or preference as to which party should

prevail, either the State or the accused, I want you to disabuse your minds of it as it was wholly unintentional. The sole province of your Judge is to try to see that the matters are presented according to law, and to leave it up to you as Officers of this Court, honest, conscientious, responsible citizens of Madison County to go out and do what you think is right. Make findings of fact as to whether or not this Defendant is guilty. If he is guilty, then fix a punishment commensurate with his guilt. If he is not guilty, then, find him not guilty. That I have tried to do, so if I have said anything or done anything to indicate, hint or suggest that I do have a desire or preference as to which of the parties should prevail, please disabuse your minds of it, and forget about it.

Now, ladies and gentlemen, you may retire at this time and consider your verdict. Elect your foreman, but don't do anything else until I send you the indictment and the documentary evidence. I have to give counsel for the State and counsel for the Defendant an opportunity to point out where I may have made an error or omission in my charge. You may go to the jury room and elect your Foreman. As soon as the indictment and documentary evidence is sent out to you, begin your deliberations and reach a verdict which must be unanimous. Reach a unanimous verdict that speaks the truth in this case, and let's dispose of this case. You may retire.

(Jury retires to jury room)

Georgia, Madison County:

I, H. B. Snelling, Clerk Superior Court of said state and county do hereby certify the foregoing ten pages constitutes a true and correct photostatic copy of the

charge of the court in the case of The State vs. Jerry Mathis.

Given under my official hand and seal of office this 24th day of June, 1970.

/s/ H. B. SNELLING

Clerk Superior Court
Madison County, Ga.

APPENDIX E

PENDING CASES INVOLVING THE CHARGE ON ALIBI GIVEN TO JURIES IN GEORGIA CRIMINAL TRIALS (IN ADDITION TO APPENDIX F, PETITION FOR WRIT OF CERTIORARI, *S. LAMONT SMITH, WARDEN, V. JACK HENRY SMITH,* UNITED STATES SUPREME COURT, 1971 TERM, NO. 71-1148).

DIRECT APPEALS

1. Court of Appeals of Georgia: *Butler v. State,* No. 46990, decided April 3, 1972.

2. Supreme Court of Georgia: *Earnest Payton v. State,* No. 27221, pending briefs and argument.

COLLATERAL REVIEW

1. United States Court of Appeals for the Fifth Circuit: *David Hugh Clements v. Leroy Stynchcombe,* No. 71-1997, appeal from Northern District of Georgia, affirmed February 1, 1972.

2. United States District Court, Northern District of Georgia, Atlanta Division: *Amos Lumpkin v. E. B. Caldwell, Warden,* Civil Action No. 15959.

3. United States District Court, Northern District of Georgia, Atlanta Division: *Ralph Connelly v. E. B. Caldwell, Warden,* No. 16252, pending.

4. United States District Court, Northern District of Georgia, Atlanta Division: *Emory N. Brown v. E. B. Caldwell, Warden,* No. 15,600, stayed pending decision

of United States Supreme Court in *Smith v. Smith*, No. 71-1148.

5. United States District Court, Northern District of Georgia, Atlanta Division: *William T. Poss v. E. B. Caldwell, Warden*, No. 16,307, pending. [This follows denial of writ of certiorari by United States Supreme Court on February 22, 1972, in *Poss v. Smith*, No. 71-5639.]

6. United States District Court, Northern District of Georgia, Atlanta Division: *Charles Oscar Tolbert v. Caldwell*, No. 15,509. Stayed April 13, 1972.

7. United States District Court, Northern District of Georgia, Atlanta Division: *Joseph Quick v. E. B. Caldwell, Warden*, No. .....

8. Tattnall Superior Court: *George Nolley v. E. B. Caldwell, Warden*, No. 71-60; order and judgment filed March 30, 1972, denying habeas corpus.

9. Tattnall Superior Court: *James Wynne v. E. B. Caldwell, Warden*, No. .....; petition filed April 13, 1972, hearing set for May, 1972.

10. Tattnall Superior Court: *Russell Mosely v. E. B. Caldwell, Warden*, No. 72-2, pending.